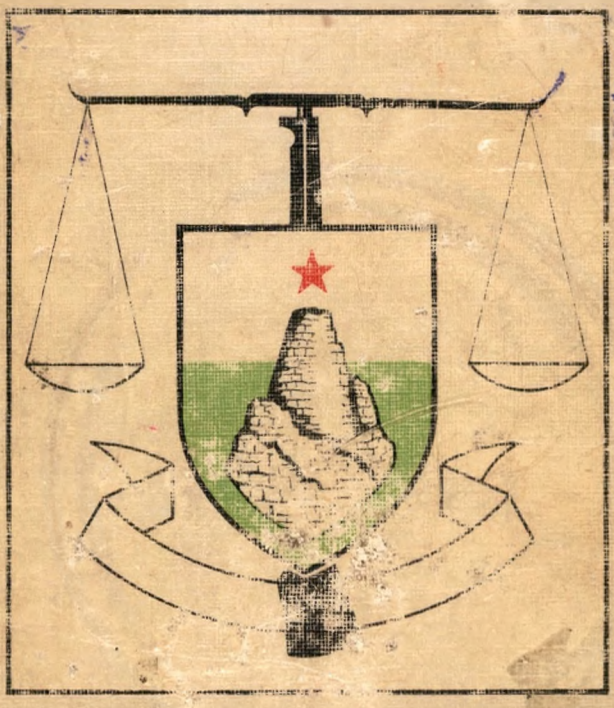

ZIMBABWE·LAW·REVIEW

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THE ZIMBABWE LAW REVIEW

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Zimbabwe's Independence in April 1980, achieved as it was by a remarkable combination of revolutionary and legal activity, created a special challenge to Zimbabwean lawyers. Particularly significant for legal scholars at the University of Zimbabwe was the dramatic transformation resulting from the fact that a whole body of ideas and perspectives, unacceptable, unpopular or actually unlawful under the colonial state, suddenly became 'thinkable' and available to thinking Zimbabweans. Of these ideas, Marxism and Marxism-Leninism were only the most dramatic example, though by virtue of the election to government of a Party which proclaimed as its ultimate objective the achievement of a socialist order through Marxism-Leninism, they became especially relevant.

This new order was characterised then, as it remains today, five years later, by the basic elements of intellectual stimulation — contradiction, compromise, urgent demands for change and powerful claims for the retention of the *status quo*. Nowhere is this more evident than in the law, both within and around Zimbabwe, wherein is expressed in varying degrees of clarity, the tensions and tentative solutions generated by the material, social, economic and political realities of this ferment.

Thus Zimbabwean legal scholars face an agenda demanding, at a minimum, the study and awareness of the legal dimensions of, on the one hand — the articulated democratic demands of a liberated majority for justice, health, education, housing, employment and an end to poverty and dependence; and on the other hand — the equally articulate (if less rhetorical) claims of a powerful minority (as the first priority) for the retention or the minimum transformation of the capitalist economy. The legal dynamics of this contradiction must be analysed and understood in the light shed by scholars using a wide variety of perspectives.

The task also demands a thorough knowledge of the substantive elements that make up Zimbabwe's legal system. This must include a full awareness of the British-designed Lancaster House Constitution, replete with historic compromises, as well as of the inherited state machine, deeply imbued through both statute law and judicial practice, with authoritarian values and techniques. It demands the urgent study and exposition of the dense body of Zimbabwean Customary Law. Nor can it avoid a basic knowledge of Roman-Dutch Law and its deeper Romanist foundations. These provide a potential pathway to the conceptual treasury of one of the oldest legal system and to a richness of Romanist ideas developed throughout the modern world in both socialist and capitalist states which share with us this tradition. The paucity of serious scholastic exploration of Roman Law during the colonial period may be explained by the overriding imperial connection with the Anglo-Saxon Legal system. Such scholarship provides an avenue to a storehouse of knowledge and ideas, which Zimbabwean legal scholars may tread. A serious gap in our scholarship, perhaps understandable in the context of the final chauvinistic days of "Rhodesia", namely an awareness of the comparative experience

and legal knowledge of post-colonial Africa, needs to be remedied so that insights from this source can be added to the others that we must use in our efforts to make sense, for ourselves and others, of Zimbabwean legal developments at this challenging stage.

The Zimbabwe Law Review is intended as an indispensible means of meeting the above challenges. Early in 1983 the Board of the Law Department decided to work towards its publication. It also saw the *Review* as an important part of the work to evolve a contemporary and more relevant curriculum for Zimbabwean legal education. Thus readers will notice the particular emphasis given in this first issue to matters relating to Family Law, including a contribution on the subject from Tanzania, which the editors saw as requiring particular attention, The Department is also conscious of the important role the *Review* should play in an ongoing legal debate involving the Bench, the Profession, the Goverment and academics. This was one of the roles of the *Zimbabwe Law Journal* founded in 1961 as the *Rhodesia and Nyasaland Law Journal* by Professor R H Christie. The *Journal* ceased publication at the end of 1982.

As presently conceived the *Zimbabwe Law Review* will provide a vehicle not only for academics but also for students whose work merits publication. As the present volume shows, the pages of the *Review* are also open to non-Zimbabwean contributors, especially those writing on matters relevant to Africa and the Third World. This volume also demonstrates the editors' readiness to receive contributions from authors in Government and the profession, and we are particularly pleased to be able to publish here an article by the present Minister of Home Affairs. The *Review* will seek to encourage active debate on contemporary issues and thus the section entitled *Dialogue* seeks contributions on more immediate and controversial subjects in a style of presentation less rigorous than that required of other articles. It is hoped that the review of legal developments and the publication of relevant documentation will be a regular feature.

Thus the *Review* is seen as being launched in a new context, offering new opportunities and challenges to Zimbabwean and other legal writers. The objective is to respond with scholarship of the highest quality, regardless of its viewpoint. The Editors are conscious that by taking full advantage of this new intellectual freedom and opening the *Review* in this way to scholars from all ideologies they are making a fundamental break with the past. This however is not only consistent with the newly acquired academic freedom of the University of Zimbabwe, but also with the progressive order which is the national objective. Nor, it seems, will this new policy be inconstistent with the motto emblazoned on the facade of the Law Department: LEX EST ARS BONI ET AEQUI (THE LAW IS THE ART OF THE GOOD AND THE JUST)

Lastly we express the Department's gratitude to the Ford Foundation for it's assistance in the launching of the *Review*

Editor in Chief

Harare, 18th April, 1985.

THE INTEGRATION OF PERSONAL LAWS : TANZANIA'S EXPERIENCE*

B.A. RWEZAURA**

1. INTRODUCTION

Tanzania's endeavours to find an appropriate law of marriage and divorce began immediately after independence in 1961 when President Nyerere sanctioned the recording of the personal law of various communities throughout the country. In 1963 the codification team produced a comprehensive draft code which was applicable to the Bantu patrilineal groups. It was published that year as Government Notice No. 279 of 1963.[1]

It may be recalled that during the early 1960s some other African states which had recently become independent were actively involved in critically evaluating their legal systems which they had inherited from the previous colonial administration. At the Dar es Salaam Conference of 1963 for example, a number of speakers argued for the unification of customary laws noting that such a step would lead towards national unification.[2]

While efforts to record customary law were going on, some countries such as Uganda and Kenya were at the same time evaluating their marriage laws and considering alternative legislation. In Uganda in 1965, the report of the Kalema Commission[3] made a number of recommendations the most significant being the abolition of polygyny. These recommendations were not enacted into law, however, the document remains only of historical importance.

In Kenya, a commission headed by Mr Justice John F. Spry, then an able and experienced judge of the now defunct Court of Appeal for East Africa, published its report in 1968. The report was very detailed and included a draft bill which was intended to make legislative action a little easier if not quicker.

As in Uganda, the Kenya draft bill has never been passed into law even though heated discussions in Parliament and elsewhere have been made.[4]

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* This paper was originally prepared for and presented at a seminar jointly arranged by the Fundamental Rights and Personal Law Research Project, Centre for Applied Social Sciences, and the Department of Law, University of Zimbabwe on January 25th, 1983. I would like to thank the organizers of the seminar and the relevant institutions for inviting me and for their hospitality during my stay at the University of Zimbabwe.

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1. See also Local Customary Law (Declaration) (No. 4) Order, 1963 Government Notice No 436 of 1963.
2. See Proceedings of the *African Conference on Local Courts and Customary Law (1964)*
3. *The Report of the Kalema Commission on Marriage, Divorce and the Status of Women, 1965*, Government Printer, Entebbe. For a discussion of the report see Morris, H.F. (1966) "Uganda : Report of the Commission on Marriage, Divorce and the Status of Women", *Journal of African Law*, Vol 10 No 1 p 3-7.
4. Kessam, F.M. "Report of the Kenya Commission of Marriage and Divorce : A Critique" (1969) Vol 2 *Eastern Africa Law Review* pp. 179-210

A year after the publication of the Spry Commission's Report, Tanzania published its proposals on the uniform marriage and divorce. The proposals were debated for nearly two years by various interest groups and the public at large. In 1970 the proposals, now in form of a bill, were presented in Parliament and passed in 1971. The resulting legislation became known as the Law of Marriage Act 1971.[5]

What the foregoing account indicates is that after independence many African countries were dissatisfied with the state of their personal laws and were anxious to make changes appropriate to their new goals and aspirations. Their colonial experience had convinced them that it was necessary to restructure their legal system and laws in order to remove various forms of discrimination which had risen from the way the colonial legal system functioned. There was also the desire to remove the chronic internal conflict of laws which was caused by the application of the variety of personal laws within the same jurisdiction.[6]

But the unanimity which was shown by many states concerning the need to restructure their systems and to unify their personal laws was not shown at the stage of implementation. Therefore, as noted already, various commissions were appointed and produced detailed reports which continue to gather dust in the files of the relevant ministries.

Of the three East African states, only Tanzania was able to pass a new law of marriage and divorce in 1971 although Kenya managed to enact a new law of succession in 1972.[7] This step put Tanzania in a position not only of a pioneer but one of great responsibility of demonstrating the possibility of success with fundamental changes in the law to accord with post-independence aspirations of the people. One is bound to agree with Professor J.S. Read who noted that "[t]he Tanzania experience of of enacting and applying this new system of personal law will clearly be watched with the greatest interest by other African states, most of which face similar problems".[8]

In the next section I set out briefly the important matters raised in the *Government Proposals on Uniform Law of Marriage and Divorce.* I examine these proposals in order to show the objects of the Government in proposing the changes in the law. This approach provided us with a starting point towards an evaluation of the working of the new law.

II Proposals on Uniform Law of Marriage and Divorce

As already noted the Government proposals on the uniform law of marriage and divorce were published in 1969. Members of the public and

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5. Act No 5 of 1971 which came into force on May 1st, 1971
6. Sawyerr, G.F.A. "Internal Conflicts of Laws in East Africa", in Sawyerr, A. (Ed.) *East African Law and Social Change,* (Nairobi, 1967)
7. The Act became operative only in early 1980s and is now Chap. 160 of the Laws of Kenya (Eds.)
8. Read, J.S. "A Milestone in the Integration of Personal Laws: the New Law of Marriage and Divorce in Tanzania", *(1972) Journal of African Law* Vol 16 No 1 pp 19-39.

religious organizations were encouraged to give their views on the proposals. Consisting of a total of thirty paragraphs, the White Paper can be divided into four main sections. These are;

i. Provisions aimed at giving women an equal voice in the marriage relationship and to give a husband and a wife a right to determine their marriage choices;

ii. Provisions intended to introduce parity between different forms of marriage recognized under the law;
iii. Provisions relating to procedure for contracting a marriage, and;
iv. Provisions introducing a uniform procedure for divorce, separation and other matrimonial relief.

The above sections are examined in detail below.

i. *Equality in marriage*

On the question of equality between spouses, the White Paper noted that under most of the existing marriage laws a woman was not given a right "to decide anything in respect of her marriage". For example, it was noted that in "marriage contracted in accordance with the customary law rites, the girl's consent to the choice of the husband is not necessary as long as her father or guardian gives his consent to the marriage". In order to reduce the power of parents and to emphasize the voluntary nature of marriage it was proposed that all forms of marriage would be defined as a voluntary union between the concerned parties. The payment of bridewealth *(lobolo)* which was seen as an obstacle in the way of young people[9] was to be declared not essential for the validity of marriage. A minimum marriage age was fixed by the law and it was proposed that where a boy and girl had attained the age of eighteen, they could contract a civil marriage without requiring parental consent.

According to the old colonial customary and certain religious laws, once married, the White Paper noted, "the wife cannot divorce her husband even if he has committed serious matrimonial wrongs". Yet the husband in some cases may divorce the wife at will thereby causing untold suffering to her and the children.[10]

In the sphere of property relations between husband and wife the White Paper proposed to introduce a law which would permit a wife to own property separately from her husband and to retain the property she had acquired before marriage. The wife had a right to be maintained by her husband as well as a duty to maintain him if he was incapable of maintaining the family by reason of bad health or other disability.

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9. Para 14
10. Para 4.

The White Paper recommended the new law to make it an offence for a man to beat his wife. On the question of the right of the husband to claim damages on account of the wife's adultery, it was proposed to retain this right but in addition, to extend the same to the wife. The new law was to provide that a wife would have a right to recover damages from a woman with whom her husband committed adultery.

ii. *Parity Between Different Forms of Marriage*

Problems of unequal treatment of marriages under different legal regimes were a result of colonial law and policy which viewed Christian monogamous marriages as being superior to traditional and Islamic marriages. The latter were essentially polygynous. There was general disapproval of polygyny by British judges some of whom described an African marriage as a system of wife-purchase.[11] Such marital relationships were not accorded equal protection under the law and were considered inferior to the civil marriage which was monogamous. As pointed out by the White Paper "a woman married in church or at a Registrar's Office cannot give evidence against her husband, but a wife married under customary law or Islamic law is compelled to give evidence against her husband".[12] This type of distinction was to be removed by the new law so that all married women could enjoy equal status.[13]

While it used to be possible under the old law for a man married under customary law to convert his marriage into a Christian monogamous marriage when he has baptized, the reverse procedure was not allowed. Thus where such a man had two or more wives, he was compelled to select one wife and divorce all the others.

There was no similar provision for a man monogamously married to convert his marriage from monogamous to potentially polygynous and if he went through a customary law ceremony and married another wife before dissolving the first Christian marriage such person committed a crime of bigamy.

The new law was to do away with this distinction. It therefore recommended that if a man wanted to change the nature of his marriage, for instance, if a Christian wanted to marry a second wife, he could only do so after consulting his first wife and obtaining her consent.[14] Such an agreement would be witnessed by a magistrate who had the duty to ensure

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11. e.g. Hamilton C J in *R v Amkeyo* (1917) 7 E A L R 14 (Kenya)
12. Para 21.
13. See also Spry's Report at pp 13-15.
14. This proposal was later rejected by the Conference of Bishops and now S 11 (5) of the Law of Marriage Act provides that a Christian marriage can only be converted if parties cease to be Christians. Section 11 (5) states: No marriage between two Christians which was celebrated in a church in Christian form may, for so long as both the parties continue to profess the Christian faith, be converted from monogamous to polgamous and the provisions of this section shall apply to any such marriage, not withstanding that the marriage was preceded or succeeded by a ceremony of marriage between the same parties in civil form or any other form.

that such consent was freely and voluntarily given. Similar rights would be retained by spouses married polygynously but wishing to convert their marriage from customary form to a Christian or civil monogamous form by going through a ceremony. The White Paper proposed that parties could also agree at the time of contracting a civil marriage on whether their marriage was intended to be potentially polygynous or monogamous. In the former case the husband would be permitted to marry any number of additional wives without seeking the consent of the first wife.

iii. *Uniform Procedures for Contracting Marriage*

Although the new law did not wish to interfere with the marriage rites of various religious groups, the White Paper suggested that it was to require the observance of a minimum set of procedures for contracting a marriage. First a centralized system of registration was to be created. The system would be manned by the Registrar General assisted by a number of officials. There would be established in every registration area a district registrar and as many assistants district registrars as the Minister considered necessary. Ministers of religion, Islamic Sheikhs and priests wishing to solemnize marriages among the followers of their faiths were to be licenced by the state before being allowed to solemnize marriages. The Area Commissioner, a state official in charge of the District, was also to be licensed as a marriage officer entitled to officiate at all civil ceremonies.

Anyone intending to contract a marriage was to be required to give twenty-one days' notice to the Registrar unless exempted from doing so. The Registrar would then forward the particulars of the marriage to the Registrar-General. A couple wishing to contract a customary law marriage was expected to notify the person authorised by the Minister to solemnize such marriages. Such persons would include village and ward level government officials.

iv. *Uniform Procedures for Divorce*

Perhaps one of the radical proposals was that no marriage would be dissolved except by a judicial decree pronounced by a court of competent jurisdiction. The proposals in effect abolished non-judicial divorce and required even parties married under Islamic law to obtain a court decree before their marriage could be validly terminated. As the White Paper argued, divorce has such far-reaching consequences, especially for children, that it was deemed necessary for the state to intervene in order to ensure that justice is done.

The new law was to require the establishment of Marriage Conciliation Boards in every ward, village and town throughout the country. Anyone wishing to petition for divorce would do so only after satisfying the court that he or she had tried to seek reconciliation and failed. Provisions for reconciliation were to apply to all people irrespective of their faith, race or ethnic origin.

Courts were to have concurrent original jurisdiction to hear matrimonial disputes and appeals from primary courts were to go directly to the High Court. The new law was to abolish the matrimonial offence doctrine and a divorce court would henceforth order dissolution of marriage only if it was satisfied that the marriage had completely broken down and that the parties could not be expected to continue to live together.

In conclusion the White Paper stated that it was not the purpose of the proposed legislation "to make serious incursions in the rights of the husband. The object of these proposals was to safeguard the interests of both the husband and the wife."[15] This was necessary in order to accord equal treatment to the wife who did not have the same rights and remedies in matrimonial matters as the husband under the colonial laws.

The new law was intended to promote respect and equality in the marriage and was therefore consistent with the goals and aspirations of the entire country. In the words of the White Paper, it was "essential that the law should protect the rights of the wife so that she may bring up her children to be good citizens".[16]

These proposals were enacted without substantial alteration and form a correct summary of the new law. I examine in the next part the Law of Marriage Act and its application in Tanzania.

III. The New Marriage and Divorce Law

In 1975 I began a five region study to find out the problems connected with the application of the new law. My aim was to gather a general impression of how the new law was working especially in the rural areas where over 95% of the population reside and where I expected to find difficulties mainly due to the fact that indigenous traditional law and practices would be more dominant there than, for example, in urban centres.

The methodology of my research combined case material and interviews. I consulted first local primary court records to see what kind of disputes were being brought, how they presented, how they were decided, whether there was an appeal, and finally who was the complainant - i.e., whether it was the wife or the husband.

Then I conducted interviews with lower courts' personnel including magistrates, courts clerks and court assessors. Most of these interviews, which took place after I had read the case material, were intended to either confirm or dispel some of the impressions gathered through reading the cases.

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15. Para 28.
16. *Ibid*

Finally I interviewed ward and village leaders whom I expected to be involved in the settlement of matrimonial disputes. These included members of the local Marriages Conciliation Boards, Chairmen of Arbitration Tribunals, Church and other religious leaders, and the ruling party leadership. I also talked to litigants and several other people. I present below in a summary form my findings.

i. *Regional Discrepancies*

On the question of what kind of disputes come to courts I found regional discrepancies. For example in Kagera Region where I started, I found that few women took their marital problems to official courts. There were few disputes concerning control of rights in children or refund of marriage payments after divorce. Similar findings were made in Kilimanjaro and Arusha regions.

On the other hand I found in Mwanza and Mara regions, a large number of disputes concerning children, refund of marriage payments, and divorce.

In Kagera and Kilimanjaro regions I found that most parents did not demand high marriage payments from their prospective sons-in-law and were more inclined to respect their daughters's choice of spouse. In Mara region there were many disputes between parents and children over issues of choice of spouses. Parents insisted on selecting prospective spouses for their children and demanded very high marriage payments.

I got the impression that in regions where marriage payments were high parents were more anxious to control the marriage choices of their daughters and tended for force them to marry older people who had enough livestock to give.

In the Mara region people were keen to register their marriages and to obtain certificates even if they had initially married without following the procedures laid out by the new law. In contrast, I found in Kagera region little interest among couples in registering their marriages except in cases where such marriages were solemnized in church in which case it was the licensed priest who was responsible for this. There was evidence that most customary marriages were not registered despite the high literacy level of the population in this area.

With regard to divorce, there was throughout the regions surveyed an effort by couples to seek informal conciliation before divorce. Family councils, relatives, church, government and party officials were all involved by parties in the settlement of disputes. Most complainants, however, were women. In the Mara and Mwanza regions, most couples divorced out of court even though this was contrary to the new law, but when they disagreed on the amount of marriage payments refundable they then had to come to court. Resort to state courts under these circumstances provided an ideal opportunity for courts to require parties to petition for divorce

before their disputes could be heard. The favourite term used by the courts whenever such cases come before them is that parties in suing for refund or bridewealth before petitioning for divorce are in effect "putting the cart before the horse". For litigants the most important thing was not to obtain a court divorce but to secure the refund of bridewealth.

Again I found that many followers of the Islamic law continued to divorce their wives by pronouncing three *talaks,* without reference to the court as the law required them to do.

ii. *The Role of Courts*

Generally courts showed an inclination to decide in favour of wives in divorce matters. In particular they held that divorce could be pronounced before full refund of marriage payments. During the colonial times local courts did not have power to issue a divorce certificate unless the father of the divorced wife had made full refund of brideswealth.[17] This rule had the effect of forcing women whose fathers were poor or dead to remain married even where life was intolerable. By permitting a divorce before refund, the courts have enabled women to free themselves from undesirable unions. It appeared to me that not all women are ready to take advantage of this new freedom. As for the potential beneficiaries of the refund, this new measure was considered to be an unwarranted intereference in the customs and so-called traditions of the people.

Courts also appeared to support widows who wished to lead an independent existence after the death of their husbands. The new law provides that a marriage shall come to an end on the death of either spouse. However, some communities drawing from traditional law do not see death as necessarily ending a marriage. In pre-colonial times many widows did not choose to lead an independent life because the male domination of social and economic organisation of the time did not permit. On the death of husband a widow was inherited by one of the male relatives of the deceased husband. Today the system of such levirate unions is undergoing considerable change and the courts are currently helping to free women who do not wish to be inherited.[18] Courts also hold that no claims for refund of marriage payment will be allowed by courts after the death of either spouse.

A similar stand has been taken by courts concerning the mother's right to the custody of children when the marriage fails. Under traditional law all children born in wedlock belonged to the father and were his property. On divorce a wife was not expected to claim custodial rights in the child. Indeed one of the big dilemmas which faced mothers when their marriage experienced difficulties was to choose between tolerating an unhappy marriage and being separated from their children. Today,

17. See for example Rules 101 - 104 of G N No 279/63

18. Kirwen, M.C. *African widows.* (Maryknoll, New York, Orbis Books 1979); Rwezaura *Social and Legal Change in Kuria Family Relations* Unpublished Ph.D Thesis - University of Warwick, England (1982)

courts applying the new law have rejected the traditional rule and in appropriate cases do grant custodial rights to mothers. As recently noted by Mr Justice Katiti, in the case of *Siael Rwegasha v. Christian Rwegasha.*[19]

> "the times when the father's dictatorial powers over his children were recognized unquestionably, without regard to the interests of the children, have gone. It is a confirmed view that custody of children can no longer be equated with chattel ownership, where even the most unfit person would own chattel provided he has the purchasing power. In proceedings where custody or the upbringing of a minor is in question, the court in deciding that question must have regard to the welfare of the minor, or infant, as the first paramount consideration. The rights of parents whether under customary law or otherwise can be . . . weighed in light of the welfare of the said infant."

The views of Katiti J have been fully endorsed by other judges on different occasions. If this trend continues it is most likely that the traditional rule which gave a father unquestioned rights in the child will be reduced in importance.[20]

Courts have also supported women when they claim division of matrimonial property after divorce. Here again traditional law does not provide for any division of assets and divorced husbands have been strongly opposed to claims by former wives for division of matrimonial assets. Section 14(1) of the Law of Marriages Act provides that:

> "The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any assets and the division between the parties of the proceeds of sale."

Using the authority derived from this section, courts have permited division of assets between couples on divorce. Yet looking at some court decisions one gets a clear picture that courts have been generally slow in recognising the domestic services of the wife as her contribution to the acquisition of family assets. In the case of *Hamid Amir v. Maimuna Amir*[21] the appellate court considered the meaning of "joint-efforts" and concluded that the phrases did not include the ordinary house-work of a wife. In that case a wife petitioned for divorce and further claimed division of assets in the District court of Dar es Salaam. She was granted divorce and the

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19 Mwanza High Court (PC) Matr. Civ App. No. 25/77

20. Rwezaura, B.A. "Social Fatherhood at Crossroads: A Study of Changes in Child Law in Tanzania", (1972) Vol 3 *Eastern Africa Law Review* pp 67-99; "Review of *African Widows*" by Michael C. Kirwen in *Journal of Legal Pluralism and Unofficial Law* (1982) Vol 20 pp 143 - 149

21. 1977 LRT n 55

court further ordered that two houses be transferred to the wife. There was an additional order that the husband pay to the wife a lump sum of T.shs. 10,000/= out of the total of T.sh 50,000/= which was deposited in the bank at the time. No evidence was given concerning the actual contribution of the wife except that she managed the household economically and had saved money for her husband. Patel, J, rejected this argument noting that to accept a wife's services in the home as amounting to "joint efforts" would be stretching the meaning of the phrase "joint efforts" too far.

In a more recent case of *Zawaid Abdallah v Ibrahim Iddi*[22] Mapigano, J, considered a similar question and came to the conclusion that Section 114 of the Law of Marriage Act was not designed to help a married woman, who has no property or has failed to acquire any during her marriage, to secure a share in the family assets merely because of her duties as a house-keeper.

Despite this narrow interpretation given to the section peasant wives have on divorce continued to seek the help of courts to recover what they call "compensation" and others have used a Swahili word *"kiinua mgongo"* which means a form of pension benefits. For example, in the case of *Kaguri Mchuma v. Tantu Marwa*[23] a wife was granted a decree of divorce after which she claimed what she described as her "kiinua mgongo". The husband successfully opposed the claim on the ground that he could not pay or compensate her for having been a wife. In another case of *Martha Robi Timotheo v. Augustion Kiningo*[24] a former wife of a shopkeeper filed a suit claiming what she described as a "salary due to her as a former wife". The primary court awarded her some T. shs. 180 but on appeal the husband successfully argued that it was improper for the former wife to ask him to pay her a salary while she was formerly his wife and whatever services she had rendered were rendered in her capacity as a wife and not an employee.

These similar cases show that whereas wives have been forced by economic circumstances to recognise the value of their labour power, courts have been slow to grant such claims. Indeed the claims which these peasant women make reflect a change going on in the traditional social system. The changes have resulted from a steady erosion of the Kinship ideology which in precapitalist times was used to obscure property relations in these societies. Yet husbands and other elders continue to shelter behind "traditional" and status relations hoping thereby to reap benefits from the new economic opportunities open to them. They deploy the labour power of their wives in the sphere of cashcrop farming, shopkeeping, etc., and in other forms of business. On divorce when their wives make claims for division of assets accumulated through this new economic involvement, husbands invoke tradition to defeat such claims. There is no doubt that one way in which courts can contribute to the promotion of human rights

22. Dsm High Court Civil Appeal No of 1980 (unreported)
23. Mwanza High Court (P.C.) Civ. App. No 34/77
24. Tarime Primary Court Civ. Case No 130/68

is to give more liberal interpretation to the provisions of Section 114 and the concept of "joint efforts" which it embodies. Courts should also grant to women maintenance after divorce without demanding the existence of "special reasons".[25]

Despite the caution shown by courts in applying certain provisions of the new law superior courts have demonstrated willingness to apply broadly the new law even where its provisions appear to be in conflict with tradition. For some judges customary law has been likened to a "reinless wild horse which only the expert horsemen can mount and control".[26] In many ways courts have encouraged parties who wish to break away from traditional control to do so while those wishing to adhere to 'tradition' have not been interferred with. For example, whereas courts have been prepared to recognise a marriage relationship where the husband has not given bridewealth they have at the same time entertained suits for payment and refund and have generally treated this aspect of marriage as a purely contractual obligation between the parties. Indeed it can be said that where the new law has not abolished the practice courts have tended to treat traditional obligations as private contractual duties which are not binding on parties unless specifically agreed upon. In other words, courts have been prepared to enforce such obligation when they are satisfied that all the parties have initially agreed to be so bound. The implications of this practice is that courts have permitted a practice whereby parties wishing to break away from traditional constraints can do so while those who consider themselves bound by tradition have not been disturbed. Such judicial technique has been more noticeable at the level of superior courts while the primary courts have shown in some cases a tendency towards enforcing traditional obligations.

The problems which courts will have to face for some years to come is to decide when to apply rules of customary law and when to reject them on grounds that social and economic change have rendered them oppressive and inequitable. In the words of Mwakasendo J when will the wild reinless horse be put under control?

iii. ASSESSMENT

In a nutshell the five regional surveys revealed a number of matters concerning the operation of the new law of marriage and divorce. They include problems of substance, technical and administrative nature which arise in the application of the new legislation. Solutions to some of these would include the provision of better trained personnel, permitting greater access to registration facilities, publicising the law, etc.

The second problem concerns the extent to which the provisions of the new law and the push which courts are exerting will result in influencing social behaviour. This problem does not have an easy answer. For as we have seen some of the disputes between spouses do not arise merely because

25. See Section 115 (1) of the Law of Marriage Act, 1971
26. *Mbaruku v Chimonyogoro* 1971 H C D n. 406, per Mwakasendo J

there is a new law of marriage and divorce. They arise out of an ongoing complex context of social and economic relationships. The new law enters the scene to deal with such conflict and in some cases can prove an adequate tool for resolving them. Sometimes however parties can ignore the law and seek other means of resolving their disputes.[27]

As noted by Professor Moore,[28] legislation "consists of conscious attempts at social direction. But clearly societies are in the grip of processes of change quite outside this kind of control". In order for the law to be effective, it is necessary for the legislature to understand these "processes of change". The gap between the desired direction of social behaviour and that of ongoing social change must be grasped as well and efforts made to reduce it.

In Tanzania, as in most of Africa, the traditional order is in a state of rapid change. The beneficiaries of the old order who are mostly men and elders assert that tradition is immutable and must be respected while those persons who look into new order for individual autonomy in the social and economic fields assert their freedom from traditional obligations using the new law and state policy as their justification.

There is urgent need therefore for more empirical research at the grass-root level in order to assess more accurately the extent to which the integration of the traditional economic and social system into a world capitalist system has effected family relationships in Tanzania. My research among the Kuria of Tanzania from which I have drawn much insight indicates that the degree of change is greater than one is led to believe[29] One of the reasons why change is often obscured is that reference to kinship obligations and emphasis on other forms of social status relationships is often made by elders not so much to uphold tradition in high esteem but to attain certain social, economic and political advantages. The tug-of-war between elders and subordinates which is reflected in court decisions is part of an ongoing process of social conflict and change.

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27. My research did not deal with the problem of what percentage of people use state courts to resolve their matrimonial conflicts. Experience shows however that the number is not large.
28. S. Moore, *Law as Process: An anthropological approach* (London Routledge, 1978).
29. See Rwezaura, *op. cit.*, note 18

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